(2)

No. 91-1007

In The

Supreme Court of the United States

October Term, 1991

CURTIS W. CAINE, JR., M.D.,

Petitioner,

versus

M.D. HARDY, M.D., WOODIE L. MASON, M.D., JAMES STRONG, M.D., FRANK HOWELL, M.D., W.J. PATTERSON, M.D., GEORGE SMITH-VANIZ, M.D., H.D. BROCK, M.D., RICKY RUSSELL, M.D., JAMES MCILWAIN, M.D., DON BUTTS, M.D., D.I. CARLSON, M.D., JOHN CORTNEY, M.D., ROBERT STRONG, M.D., DARILYNN WILSON, M.D., as members of the Executive Committee and/or the two (2) *Ad Hoc* Anesthesia Department Investigating Committees of the Medical Staff of Hinds General Hospital, a hospital erected, owned and operated under Sections 41-13-15 to 41-13-51 of the Statutes of the State of Mississippi by the County of Hinds, Mississippi; and CECIL J. JAQUITH, DOROTHY WILLIAM, JERRY N. BLAKENEY, BRUCE DEVINEY, F.O. WOODWARD, LINDA RAFF and GLEN HOLMES, as Trustees of Hinds General Hospital appointed pursuant to Section 41-13-29 of the Statutes of the State of Mississippi, ROBERT G. WILSON as Administrator of HINDS GENERAL HOSPITAL, and HINDS GENERAL HOSPITAL, a hospital erected, owned and operated under Sections 41-13-15 to 41-13-51 of the Statutes of the State of Mississippi, by the County of Hinds, State of Mississippi,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Parties to the Proceeding are correctly set forth in the Petition.

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BRIEF IN OPPOSITION

OPINIONS BELOW, JURISDICTION AND CONSTITUTIONAL AND FEDERAL STATUTORY PROVISIONS INVOLVED

The Opinions Below, Jurisdiction, and Constitutional and Federal Statutory Provisions Involved are correctly set forth in the Petition. This case also involves the following state statutes and federal rule of civil procedure:

Mississippi Code Annotated Section 73-25-95

Any person against whom discliplinary action is taken pursuant to sections 73-25-81 to 73-25-95 shall have the right of judicial appeal as provided in section 73-25-27 relating to judicial appeal of board decisions. Provided, further, that no such person shall be allowed to practice medicine or deliver health care services in violation of any disciplinary order or action of the board while any such appeal is pending.

Mississippi Code Annotated Section 73-25-27

The Mississippi State Board of Medical Licensure after notice and opportunity for a hearing to the licentiate, is authorized to suspend or revoke for any cause named herein any license it has issued, or the renewal thereof, that authorizes any person to practice medicine, osteopathy, or any other method of preventing, diagnosing, relieving, caring for, or treating, or curing disease, injury or other bodily condition.

Such notice shall be effected by registered mail or personal service setting forth the particular reaons for the proposed action and fixing a date not less than thirty (30)

days or more than sixty (60) days from the date of such mailing or such service, at which time the licentiate shall be given an opportunity for a prompt and fair hearing. For the purpose of such hearing the board, acting by and through its executive office, may subpoena persons and papers on its own behalf and on behalf of licentiate, including records obtained pursuant to Section 1 of this act, may administer oaths and such testimony when properly transcribed, together with such papers and exhibits, shall be admissible in evidence for or against the licentiate. At such hearing licentiate may appear by counsel and personally in his own behalf. Any person sworn and examined as a witness in such hearing shall not be held to answer criminally, nor shall any papers or documents produced by such witness be competent evidence in any criminal proceedings against such witness other than for perjury in delivering his evidence. On the basis of any such hearing, or upon default of the licentiate, the Board of Medical Licensure shall make a determination specifying its findings of fact and conclusions of law.

A copy of such determination shall be sent by registered mail or served personally upon the licentiate. The decision of the Board of Medical Licensure revoking or suspending the license shall become final thirty (30) days after so mailed or served unless within said period the licentiate appeals the decision to the chancery court, pursuant to the provisions hereof, and the proceedings in chancery shall be conducted as other matters coming before the court. All proceedings and evidence, together with exhibits, presented at such hearing before the Board of Medical Licensure in the event of appeal shall be admissible in evidence in said court.

The Board of Medical Licensure may subpoena persons and papers on its own behalf and on behalf of the respondent, including records obtained pursuant to Section 73-25-28, may administer oaths, and may compel the testimony of witnesses. It may issue commissions to take testimony, and testimony so taken and sworn to shall be admissible in evidence for and against the respondent. The Board of Medical Licensure shall be entitled to the assistance of the chancery court or the chancellor in vacation, which, on petition by the board, shall issue ancillary subpoenas and petitions and may punish as for contempt of court in the event of noncompliance therewith.

Unless the court otherwise decrees, a license that has been suspended by the Board of Medical Licensure for a stated period of time shall automatically become valid on the expiration of that period and a license that has been suspended for an indefinite period shall become again valid if and when the Board of Medical Licensure so orders, which it may do on its own motion or on the petition of the respondent. A license that has been revoked shall not be restored to validity except: (1) after a rehearing by the Board of Medical Licensure, on petition of the respondent, for good cause shown, filed within ten (10) days, immediately following the service on him of the order or judgment of the Board of Medical Licensure revoking his license or (2) by order of the court, on petition as aforesaid. Any licentiate whose license becomes again valid after a period of suspension or after it has been restored to validity after a rehearing or by an order of the court, shall record it again in the office of the clerk of the circuit court of the county in which he resides in conformity with the requirements of Section 73-25-13.

Nothing in this chapter shall be construed as limiting or revoking the authority of any court or of any licensing or registering officer or board, other than the State Board of Medical Licensure, to suspend, revoke and reinstate licenses and to cancel registrations under the provisions of Section 41-29-311.

Federal Rule of Civil Procedure 10(c)

(c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

STATEMENT OF THE CASE

Petitioner's Statement of the Case misstates and omits numerous material facts. The Hinds General Hospital medical staff bylaws, rules and regulations, attached by the Petitioner to his Complaint as Exhibit "A" (R. 50-122)[1], provide for an investigation into the clinical competence of any medical staff member when initiated by a request for corrective action. (R. 74). Once such a request is made, an *ad hoc* investigation committee conducts an informal interview with the physician whose competence is in question. (R. 75). After reviewing the

[1] Cites are to the Fifth Circuit Record Excerpts (R.) unless otherwise indicated.

ad hoc investigating committee's report, the executive committee of the medical staff makes a recommendation to the hospital board of trustees. (R. 75-76).

The medical staff bylaws also provide for summary suspension "whenever [a physician's] conduct requires that immediate action be taken to protect the life of any patient(s) or to reduce the substantial likelihood of immediate injury or damage to the health or safety of any patient . . . . " (R. 76-77). A physician whose privileges have been summarily suspended is entitled to a prompt post-suspension hearing before an *ad hoc* hearing committee comprised of individuals who have not participated in the prior decision and who are not in economic competition with the affected practitioner. (R. 80-81). If after the *ad hoc* hearing committee makes its recommendation, the executive committee's recommendation is still adverse to the physician (R. 79), the physician is entitled to an appellate review by the hospital board of trustees. (R. 85-88). However, a physician who fails to appear without good cause for the scheduled *ad hoc* hearing is deemed to have waived the right to appellate review by the board of trustees. (R. 82). Under Mississippi law, a physician aggrieved by a hospital's decision to curtail clinical privileges may appeal the hospital's decision to chancery court pursuant to MISS. CODE ANN. § 73-25-95 and related statutes. (R. 351).

Petitioner's Complaint alleged that on April 4, 1988, the hospital administrator requested an investigation into Dr. Caine's anesthesia practices. (R. 9). On that same day, the chief of staff appointed an *ad hoc* investigating committee to review the relevant hospital chart (R. 124), as required by the bylaws. (R. 75). The bylaws required this

committee to provide Dr. Caine an interview prior to making its report to the executive committee. (R. 75). This interview was held on April 11. (R. 12).

A second interview requested by Dr. Caine was held on April 16. (R. 15). After completing its investigation, the investigating committee reported to the executive committee recommending that Dr. Caine's privileges be immediately suspended. The investigating committee detailed specific medical reasons justifying its recommendation. The committee found that Dr. Caine allowed a patient to die by failing to follow accepted anesthesia procedures and by thereafter abandoning the patient. (R. 134-135). Nowhere in the Complaint does Dr. Caine deny these findings.

The *ad hoc* investigating committee did not have the power under the bylaws to summarily suspend Dr. Caine's privileges. (R. 77). However, the medical staff executive committee was so empowered and on April 25, 1988, after receiving the investigating committee report, summarily suspended all of Dr. Caine's clinical privileges (R. 17, 141-143). Dr. Caine was promptly notified of this decision and advised of his right to request a hearing within thirty days before an *ad hoc* hearing committee. (R. 144). On May 4, 1988, he requested such a hearing and was promptly notified by letter of the date, time and place of the hearing as well as the composition of the hearing committee. (R. 18-19). In the same letter, he was given detailed notice of the charges against him. (R. 146-147).

The bylaws entitled Dr. Caine to a hearing within seven days from the date of the request. (R. 80). However,

Dr. Caine twice requested a continuance of the scheduled hearing, both of which were granted. (R. 21, 23). On June 13, Dr. Caine agreed not to exercise clinical privileges at the hospital pending a final decision by the board of trustees. (R. 228). Prior to the rescheduled third hearing date, Dr. Caine requested the recusal of two committee members. (R. 38-39). This request was also granted. (R. 39). This newly formed hearing committee consisted of physicians who are not Defendants in this lawsuit, who did not participate in the investigating or executive committee decisions, who were not in economic competition with Dr. Caine, and against whom Plaintiff has not alleged any specific facts supporting his claim of bias. (R. 39-40). Nevertheless, in the belief that "no member of the Medical Staff of Hinds General Hospital could serve on an *Ad Hoc* Hearing Committee" (R. 42), Dr. Caine requested that all members of the hearing committee recuse themselves and that the hearing committee be comprised of physicians from outside the medical staff at Hinds General Hospital (R. 43), although the bylaws did not provide for such a procedure. After this request was refused (R. 44), Dr. Caine, on advice of counsel, refused to appear before the *ad hoc* hearing committee to defend himself. (R. 45). No judicial appeal pursuant to § 73-25-95 was taken.

SUMMARY OF THE ARGUMENT

The questions presented in the petition arise only if one rejects the *en banc* Fifth Circuit's interpretation of the Complaint in favor of Petitioner's interpretation. The statement of the case contained in the Petition cannot be

reconciled with the summary of the facts given in the *en banc* Fifth Circuit's opinion. This irreconcilable difference results not from any error on the part of the Court below but from Petitioner's decision to ignore the plain language of the Complaint and the exhibits which he attached to his Complaint, which are part of that Complaint for all purposes. *Fed. R. Civ. P.* 10(c). Such a dispute over the reading of a complaint or the effect of exhibits is certainly not grounds for exercising this Court's power of supervision.

Moreover, several sound reasons justify denying the Petition. First, the Fifth Circuit's principal holding in this case was based upon the traditional *Matthews* balancing test. This due process analysis presents no novel or undecided issue of law and is inappropriate for review by this Court under the facts presented here. Second, there exists no conflict among the circuits as to any question of law presented in this case, including the interpretation of this Court's decision in *Zinermon v. Burch*, 494 U.S. ___, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990). Indeed if *Zinermon* has any clear message, it is the reaffirmance of this Court's prior precedent holding that the necessity of quick action by the state justifies the deprivation of property so long as the state provides a prompt post-deprivation procedure. This need for quick action under exigent circumstances is the touchstone of the *en banc* Fifth Circuit's decision and is consistent with this Court's decisions in *Zinermon* and *Parratt v. Taylor*, 451 U.S. 527 (1981). The remaining issues in this case are well established and were appropriately addressed by the courts below.

ARGUMENT

REASONS FOR DENYING THE WRIT

1. The *En Banc* Fifth Circuit's Principal Holding Does Not Present an Issue Worthy of Certiorari

The *en banc* Fifth Circuit's principal holding was that under *Matthews v. Eldridge*, 424 U.S. 319 (1976), the complaint failed to state a claim for denial of procedural due process.[2] In *Matthews*, this Court required a balancing of the following three factors in determining whether the particular procedure employed is constitutionally adequate: (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of the interest; and (3) the government's interest. Citing *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908), the lower court in this case recognized that in applying the *Matthews* balancing test, "the necessity of quick action" by the state will justify the summary deprivation of property if followed by adequate post-deprivation procedures. In such cases, the state's powerful interest clearly outweighs any private interest and the risk of an erroneous deprivation. For this reason, the court below found that exigent circumstances justified the summary suspension of Dr. Caine's hospital privileges, that Dr. Caine was provided adequate post-suspension procedures, and that as a result, the Petitioner's Complaint failed to state a

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[2] The complaint alleged only claims for denial of procedural due process and, as amended, alleged claims for denial of the First Amendment right of free speech. No claim for denial of substantive due process was alleged.

procedural due process claim upon which relief could be granted.

The medical reasons given by the hospital as justification for the summary suspension of Dr. Caine's hospital privileges are contained in documents, attached to the Complaint as exhibits. Exhibit "I" to the Complaint provides clear evidence of Dr. Caine's incompetence and his danger to patients. In it, a committee member stated:

> More frightening than a lack of knowledge is the lack of concern for his patient's welfare and a denial of responsibility for his patient's welfare that, in my opinion, are demonstrated by the following items. Dr. Caine evidently was aware, at the time he anesthetized his patient, that cricoid pressure was and is the standard of practice in a patient at risk for regurgitation of gastric contents. He made the decision not to use cricoid pressure because he felt that the nurses in the operating suite were incapable of giving cricoid pressure correctly. In my experience, this has not been the case. My impression from our interview was that he saw no reason to change this aspect of his anesthesia technique.
>
> Even lack of the knowledge necessary to correctly interpret the data the patient monitors were showing cannot justify leaving this patient under the care of the nurses in the recovery room without a physician responsible for the patient close by. After he left the recovery area, he did not see the patient or call to check on his status again. When told by telephone that the patient had arrested, he was not concerned enough to return to the hospital to ascertain what had occurred.

(R. 131). Despite Petitioner's current assertions, nowhere in his fifty-page Complaint does Dr. Caine deny these findings. Nowhere does the Complaint dispute that he was guilty of incompetence.

Furthermore, exhibits to a complaint are a part thereof for all purposes and may be considered by the court on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Fed. R. Civ. P.* 10(c); *see Zinermon*, 108 L.Ed.2d at 109; *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991); *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986); *Sullivan v. United States*, 788 F.2d 813, 815 (1st Cir. 1986). Thus, the lower court was eminently correct when it determined that because of the necessity of quick action in order to protect against further patient deaths, no further predeprivation procedures were constitutionally required.

The court was likewise correct when it determined that Dr. Caine was provided all the postdeprivation process to which he was entitled and that the intricacies of *Zinermon* need not even be reached. In *Zinermon*, this Honorable Court expressly excepted cases such as this one from its holding. The Court first emphasized that "*Parratt* is not an exception to the *Matthews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Matthews* equation – the value of the predeprivation safeguards – is negligible in preventing the kind of deprivation at issue." *Zinermon*, 108 L.Ed.2d at 116. The Court then reaffirmed its stance that "[1] the necessity of quick action by the state *or* [2] the impracticality of providing any predeprivation process" justify the use of postdeprivation procedures alone. *Id.* at 115 (emphasis added). *Zinermon*

concerns only the second category of cases – those in which predeprivation procedures are impractical. This case, however, falls within the first category of cases in which there is a necessity of quick action and for this reason *Zinermon* does not apply. Since *Zinermon* is inapplicable, the clearly adequate postdeprivation procedures available to Dr. Caine satisfied due process as a matter of law. *Parratt*, 451 U.S. at 538-39.

In sum, the principal holding of the court below was based upon a traditional due process analysis using the *Matthews* balancing test, which is wholly unaffected by *Zinermon*. The sound reasoning employed by the lower court would compel the Court to affirm the decision even if it disagreed with the Fifth Circuit's interpretation of *Zinermon*. Thus, the Petition should be denied.

2. The Facts Alleged in the Complaint Do Not Present the Substantive Issues Raised in the Petition

The entire Petition is premised upon Petitioner's incorrect reading of the Complaint – a reading expressly rejected by an overwhelming majority of the *en banc* Fifth Circuit Court of Appeals. Only if the Court reviews the fifty-page Complaint along with its voluminous exhibits and then rejects the Fifth Circuit's reading of these documents would this Court even reach the substantive issues stated in the Petition.

First, Petitioner's principal argument is that the lower court incorrectly interpreted *Zinermon*. This argument is in turn based upon the premise that the exhibits to the Complaint should not have been considered. As

discussed above, the court was absolutely correct in reviewing these materials as they were a part of the Complaint and the record on appeal for all purposes. This Court employed this exact approach in *Zinermon* when it analyzed the exhibits to the complaint in detail. *Zinermon*, 108 L.Ed.2d at 109. The exhibits to the Complaint show that Dr. Caine was guilty of gross incompetence which led to the death of a patient undergoing surgery at Hinds General Hospital. Nowhere in Dr. Caine's Complaint did he refute these medical findings. As a result, it was uncontradicted that the summary suspension of his clinical privileges was justified.

Second, the correctness of the decision to summarily suspend is "beside the procedural due process point." *Amsden v. Moran*, 904 F.2d 748, 755 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991); *see Carey v. Piphus*, 435 U.S. 247 (1978). Procedural due process addresses only the procedures afforded and not the correctness of the deprivation itself. Consequently, whether the decision to summarily suspend Dr. Caine's privileges was correct is irrelevant under procedural due process analysis, and whether the court below properly considered the exhibits containing the reasons for the summary suspension should not even be an issue in this case.

Third, procedural due process requires only that the state provide a person notice of charges and an opportunity to be heard at an appropriate time. Petitioner's statement of the case fails to point out that the Complaint clearly alleged that Dr. Caine was offered a full hearing before a separate *ad hoc* hearing committee, which he refused. (R. 40). Dr. Caine was advised of his right to this hearing immediately after imposition of the summary

suspension. (R. 144). After requesting a hearing (R. 145), he received a detailed description of the charges made against him. (R. 146-47). Subsequently, he requested and was granted continuances of this hearing on two different occasions. (R. 148-49, 229). Additionally, he requested and was granted a special appearance before the executive committee. (R. 228). At this time, he "agreed not to exercise his clinical privileges of performing anesthesia at Hinds General Hospital pending final resolution and outcome of this matter . . . . " (R. 228). After agreeing that the *ad hoc* hearing would be held on September 21, 1988 (R. 273), Dr. Caine filed a motion requesting that two members of the *ad hoc* hearing committee recuse themselves. (R. 276-79). After this request was granted (R. 39), Dr. Caine filed a second motion requesting no less than all members of the Hinds General Hospital medical staff recuse themselves. (R. 281). Dr. Caine insisted upon an outside hearing committee, a procedure not contemplated by the medical staff bylaws. (R. 81) and not required by any applicable law. When the executive committee denied his request for an outside hearing committee, Dr. Caine declared that no member of the Hinds General medical staff could properly sit on the *ad hoc* hearing committee and, on advice of counsel, refused to appear and defend the charges made against him or present evidence of the alleged bias. (R. 45). At that point, Dr. Caine was deemed to have waived his right to a hearing and appellate review. (R. 79-80). Without any evidence in the record to contradict the findings of the investigating and executive committees, the hospital board of trustees had no choice but to accept the executive committee's recommendation that the suspension be continued. (R. 292).

In order to challenge the bias of a hearing committee, a plaintiff must show from the hearing record actual bias. *Laje v. Thomason General Hosp.*, 564 F.2d 1159, 1162 (5th Cir. 1977). Since Dr. Caine refused to appear before the *ad hoc* hearing committee, there is no record from which to find that the hearing committee was biased in any way. Thus, there is absolutely no basis on which to find that Dr. Caine was deprived of his right to a fair and impartial hearing.

Read fairly, the allegations of the Complaint present a case in which a physician guilty of gross incompetence was provided more than adequate procedures to safeguard against any erroneous deprivation. Whether the Fifth Circuit correctly interpreted this Court's decision in *Zinermon*, it was eminently correct in determining that Dr. Caine was provided all the process to which he was entitled under *Matthews*. The Petitioner's sole challenge to this legal determination is an attack on the lower court's consideration of the exhibits to his Complaint. Such consideration was appropriate and, even if inappropriate, is unworthy of certiorari.

3. The Petition Presents No Conflict Among the Various Circuit Courts of Appeal.

The *en banc* Fifth Circuit's interpretation of *Zinermon* in this case is consistent with every circuit court decision interpreting *Zinermon*. This Court denied certiorari in several of these cases. *See Schroeder v. City of Chicago*, 927 F.2d 957 (7th Cir. 1991); *Coriz v. Martinez*, 915 F.2d 1469 (10th Cir. 1990); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990); *Easter House v.*

Felder, 910 F.2d 1387 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 783 (1991); *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 786 (1991); *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991); *Katz v. Klehammer*, 902 F.2d 204 (2d Cir. 1990); *Valenti v. Cohen*, No. 88-6193 (E.D. Pa. April 25, 1990), *aff'd.*, 904 F.2d 697 (3d Cir. 1990). The only circuit court cases that Respondents have found which have relied on *Zinermon* in finding a sufficiently alleged procedural due process claim have done so where no exigent circumstances justifying quick action existed. *See, e.g., Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775, 784 (2d Cir. 1991); *Plumer v. Maryland*, 915 F.2d 927, 929-31 (4th Cir. 1990).

In addition, the circuits agree that it is appropriate to consider exhibits to a complaint when ruling on a motion to dismiss pursuant to Rule 12(b)(6), *Wood*, 925 F.2d at 1582; *Morton*, 795 F.2d at 187; *Sullivan*, 788 F.2d at 815; *AMFAC Mortgage Corp. v. Arizona Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978), an approach employed by this Court in *Zinermon*.

Finally, the circuits have uniformly applied this Court's rule that statements made in the workplace by public employees are protected by the First Amendment only if they constitute matters of public concern. *See, e.g., Smith v. Cleburne County Hosp.*, 870 F.2d 1375, 1382 (8th Cir.), *cert. denied*, 110 S.Ct. 142 (1989); *Zaky v. United States Veterans Admin.*, 793 F.2d 832, 839 (7th Cir.), *cert. denied*, 479 U.S. 937 (1986); *Davis v. West Community Hosp.*, 755 F.2d 455, 461-62 (5th Cir. 1985).

The uniformity among the circuits, and this Court's previous denial of certiorari to consider other circuit

court decisions interpreting *Zinermon* in a similar manner, strongly suggest the correctness of the Fifth Circuit's decision in this case and the undesirability of granting certiorari to review that decision.

4. The Decision of the Court Below Does Not Conflict with Any Decision of This Court

The decision of the *en banc* circuit court below is consistent with the decisions of this Court. Long before *Parratt, Hudson v. Palmer*, 468 U.S. 517 (1984), and *Zinermon*, this Court decided the case of *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908), in which the owner of food products which were seized and condemned by the Chicago Board of Health filed procedural due process claims against the city for failing to provide a predeprivation hearing. *Id.* at 315. Relying on the need for quick action in order to protect the health and welfare of potential consumers of the seized food, the Court found that the plaintiff's bill did not state a cause of action for the denial of due process even though the plaintiff contended that there was no emergency justifying the seizure without first providing the predeprivation hearing. *Id.* at 319, 321.

In *Zinermon*, this Court reaffirmed this sound law, stating that the "necessity of quick action" by the state justifies the lack of predeprivation procedures so long as the state provides adequate postdeprivation procedures or remedies. *Zinermon*, 108 L.Ed.2d at 115 (quoting *Parratt*, 451 U.S. at 539). Under *Zinermon*, where quick action is necessary, the three preconditions for application of the *Parratt/Hudson* doctrine – unpredictability, impossibility

and authorization – are not even reached. Thus, regardless of how those factors may be considered, the Fifth Circuit's decision below is consistent with *Zinermon* and need not be disturbed.

In *Zinermon*, the petitioner, Burch, was admitted as a voluntary patient for treatment at a psychiatric hospital, even though he was incompetent to give informed consent to his admission. *Zinermon*, 108 L.Ed.2d at 111. The relevant Florida statute contained procedures for voluntary, involuntary and "short-term *emergency*" admission. *Id.* at 111 (emphasis added). The latter procedure, which is analogous to the summary suspension procedures employed in this case, provided for immediate institutionalization followed by a prompt post-admission hearing. *Id.* This Court had no criticism of Florida's statutory scheme for emergency admission, and thus *Zinermon* offers no support for Dr. Caine's allegations that the summary suspension procedures here were in some way constitutionally deficient.

Furthermore, the Petitioner here does not argue a violation of his substantive due process rights but limits his claims to procedural due process. This Court has previously established that a procedural due process claim does not hinge upon whether the deprivation was erroneous but whether the procedure that resulted in the deprivation was constitutionally adequate. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). As a result, even if cert were granted, whether the summary suspension was erroneous would not be an issue.

In short, in stark contrast to *Zinermon* where there was no evidence that Burch posed a danger to others, the

facts here clearly showed that Dr. Caine posed great danger to patients whose lives were entrusted to him. The summary suspension procedures employed provided Dr. Caine the additional safeguard the Supreme Court found lacking in Florida's voluntary admission procedures – an adequate timely hearing.

Finally, Petitioner's assertion that the *en banc* Fifth Circuit "simply ignored *Zinermon* and relied upon nonfacts" (Petition, p. 27) is baseless. The court below carefully analyzed *Zinermon* and found (1) Dr. Caine was provided all the process which he was due, and (2) *Zinermon* does not alter this result. Petitioner interprets *Zinermon* as resurrecting procedural due process claims where previously there were none. This approach defies common sense and is unsupported in law. After careful analysis, the Fifth Circuit held alternatively that, even if Dr. Caine had stated a procedural deficiency for the initial deprivation of his privileges, the adequate postdeprivation remedies were ample to protect his rights. The court found simply that the facts of this case substantially differed from those in *Zinermon*. Thus, its alternative holding, though in essence dictum, was consistent with the decisions of this Court.

5. The Dismissal of Petitioner's Alleged First Amendment Claims Is Unworthy of Certiorari

Petitioner's argument with regard to his alleged First Amendment claims is that he had an absolute right to amend his Complaint under *Fed. R. Civ. P.* 15(a). He fails to point out that after filing his motion for leave to amend

and having it granted, the Defendants filed a supplemental motion to dismiss the amended Complaint. (R. 345-46). Defendants asserted that Plaintiff's amendment to his Complaint failed to state a claim upon which relief could be granted since the "speech" alleged was not a matter of public concern and, thus, not protected by the First Amendment. Although the district court subsequently reversed itself and denied Dr. Caine's proposed amendment, it treated the Complaint as amended and addressed the substantive issue of whether the amended complaint stated a claim for violation of Dr. Caine's First Amendment rights. Likewise, the *en banc* Fifth Circuit Court of Appeals treated the Complaint as amended and addressed the substantive issue of whether Dr. Caine's amended complaint failed to state a claim upon which relief could be granted. Thus, if error at all, the district court's denial of Dr. Caine's motion to amend the Complaint was clearly harmless. Certainly, such a procedural matter does not justify the exercise of this Court's power of supervision, much less Petitioner's personal attack on the lower courts. (Petition, p. 19).

The Complaint states that Dr. Caine opposed the alleged exclusive contract because it would "injure and infringe upon his own anesthesia practice in Hinds General Hospital." (R. 7-8). His objections to this contract were based solely upon his own personal finances and ambitions. Nowhere does the Complaint allege that the awarding of the alleged contract would in any way detrimentally affect the quality of patient care at Hinds General. Likewise, the Complaint does not allege that the election of Dr. Hardy as anesthesia department head would in any way affect the public concern. Dr. Caine's

amendment to his Complaint added nothing to these allegations except the insertion of the words "First Amendment." (R. 338).

This Court has well defined the scope of protection provided by the First Amendment to statements made within the workplace by public employees. *See Connick v. Myers*, 461 U.S. 138 (1983). Because, Dr. Caine's statements did not address a matter of public concern, they are not protected by the First Amendment. This Court need not grant certiorari in order to revisit this issue where no conflict exists.

CONCLUSION

The Petitioner disagrees with the *en banc* Fifth Circuit's reading of the Complaint. This disagreement is the *sine qua non* of his Petition for a Writ of Certiorari and does not justify review of the lower court's decision by this Court. The principal holding of the court below was based upon a traditional procedural due process analysis employing the *Matthews* balancing test. Such an approach has long been established and countenanced by this Court and need not be revisited at this late date. No conflict has arisen among the circuits which would justify this Court revisiting its decision in *Zinermon*, and no conflict exists between the decision of the court below in this case and prior decisions of this Supreme Court. Finally, the substantive issues underlying the Petitioner's alleged First Amendment claims have long since been clarified by this Court and implemented by the lower

circuit courts of appeal. No novel or undecided First Amendment issue is presented in this case.

Accordingly, Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari.

This the 25th day of February, 1992.

Respectfully submitted,

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